OFFICE OF ADVOCACY
U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, DC 20416

August 28, 2000

William E. Kennard, Chairman
Federal Communications FCC
445 12th Street, S.W.
Washington, D.C. 20554

Re: Wireless Medical Telemetry Services; ET Docket No. 99-255

Dear Chairman Kennard:

This letter addresses the regulatory flexibility analyses prepared in conjunction with recent rules establishing Wireless Medical Telemetry Service (WMTS). This rulemaking is designed to assure that certain health care equipment may operate free of interference from competing spectrum users. The Office of Advocacy of the U.S. Small Business Administration commends the FCC for taking action on this important subject. But Advocacy must protest the lack of consideration the FCC shows the Regulatory Flexibility Act (RFA), which is designed to assure that agency rules demonstrate sensitivity to the needs of small businesses.

In comments it filed in this proceeding, Advocacy pointed out that the FCC's NPRM and initial regulatory flexibility analysis (IRFA) fail to consider the impact of the proposed rules on small business and fail to propose alternatives designed to lessen this impact while serving the FCC's regulatory objectives.[1] The FCC's final regulatory flexibility analysis (FRFA) is no better.

In fact, the FCC demonstrates a fundamental misunderstanding of the purpose of RFA. RFA seeks "to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration."[2]

[1] *See* 5 U.S.C. §§ 603(a), 603(c).
[2] Pub. L. No. 96-354, 94 Stat. 1164, Sec. 2(b) (codified at 5 U.S.C. §601).

In its FRFA, the FCC writes, "We considered the effect on small business from the outset and made the rules apply equally to all parties. Thus, we consider the IRFA in this proceeding to be adequate." But RFA is designed to avoid one-size-fits-all regulations. In enacting RFA, Congress found that, "laws and regulations designed for application to large scale entities have been applied uniformly to small businesses . . . even though the problems that gave rise to government action may not have been caused by those smaller entities."[3] And, "the practice of treating all regulated businesses, organizations, and governmental jurisdictions as equivalent may lead to inefficient use of regulatory agency resources, [and] enforcement problems."[4] The FCC's view of RFA seems exactly opposite from Congress's stated purpose.

The FCC should tailor its regulations to the size of the industry participants it regulates, and should avoid uniform rules that impose disproportionate burdens on small businesses if less burdensome alternatives would achieve the same objectives. The size of the businesses that a rule affects is important to determine their ability to shoulder regulatory costs. Small and large entities possess different resources. A large business typically can absorb costs easier than a small business. A costly regulation may unnecessarily drive a small entity out of business.

In its FRFA, the FCC points out that the law does not require its analysis of small business impact to be contained within the NPRM, but only in the regulatory flexibility analysis. But, as a practical matter, if the agency is considering the impact of its rules on small business, as the law requires, this thought process should be transparent. As FCC policymakers grapple with rulemaking issues, small business impact should be a significant consideration. It seems natural for the NPRM to reflect this process.

The FCC also takes the position that the NPRM would duplicate the IFRA if it too contained discussion of the rules' impact on small business. The FCC fails to indicate the relevance of this point. More importantly, this interpretation of the RFA's requirements would render the law a procedural nothing. The FCC's approach would permit policymakers to develop ideas, draft an NPRM, and then leave it to others to conduct an after-the-fact RFA analysis.[5] Obviously, such an analysis would be utterly divorced from the policy considerations that produced the NPRM.

Congress also requires an agency to discuss significant alternatives designed to minimize the impact of a rule on small business, consistent with the agency's regulatory

[3] Pub. L. No. 96-354, 94 Stat. 1164, Sec. 2(a)(2) (codified at 5 U.S.C. §601).
[4] Pub. L. No. 96-354, 94 Stat. 1164, Sec. 2(a)(6) (codified at 5 U.S.C. §601).
[5] Even if the FCC's reading of RFA were correct, in this particular case, no "unnecessary duplication" could possibly occur, because the FCC's IRFA contains no impact study. The IRFA lists the parties the rule would effect, lists a paperwork burden, and includes a section purporting to describe steps taken to minimize impact and alternatives considered. But the FCC does not discuss the rule's impact on small business anywhere, not in the IRFA, not in the NPRM. Nor does the FCC propose alternatives designed to minimize the impact of rules on small business.

goals.[6] In this case, the FCC's FRFA defends the alternatives it claims it presented in its IRFA: "The IRFA . . . did in fact include an analysis of the type required by the IRFA. Specifically, it discussed the simplified compliance and reporting requirements we considered to minimize the impact of the rules on small businesses." But the IRFA merely summarizes the proposed rule; it offers no alternatives designed to minimize the impact of the rules on small businesses.[7]

Congress requires an agency's FRFA to describe "the steps the agency has taken to minimize the significant economic impact . . ., including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency . . . was rejected."[8] The FCC cannot reasonably conclude from this language that it may make one proposal, suggest no significant alternatives to that proposal, and stay within the law. The FCC must clarify its analysis of each alternative and discuss the factual, policy, and legal reasons why the FCC chose one alternative over others.[9] But its FRFA fails to fulfill this statutory requirement.

The FCC should consider small business impact and alternatives as an integral part of its entire decision-making process. This analysis should be extensive enough that the FCC could prepare the IRFA by reviewing and summarizing ideas expressed in its NPRM. And the FRFA should flow naturally from opinions expressed by commenting parties in response to the FCC's IRFA.

Instead, it appears as if the FCC considers small business impact after it formulates a policy proposal, and then only in a cursory manner. The resulting IRFAs lack discussion of the impact of the proposal on small business and lack discussion of alternatives designed to lessen impact. This practice would not occur if the agency's policymakers truly consider small business impact as they formulate all proposals for rules changes.

Respectfully submitted,

Jere W. Glover
Chief Counsel for Advocacy

---

[6] *See* 5 U.S.C. § 603(c).
[7] The FCC also argues that the four alternatives contained in the RFA are merely hortatory, and that no one of them needs to actually be considered. Even if the FCC's interpretation of the statutory language were correct, surely Congress did not intend that *no* alternatives be considered.
[8] 5 U.S.C. § 604(a)(5).
[9] *Id.*

R. Bradley Koerner
Assistant Chief Counsel for Advocacy

cc: Secretary Magalie Roman Salas
Commissioner Susan Ness
Commissioner Harold Furchtgott-Roth
Commissioner Michael Powell
Commissioner Gloria Tristani
Eric Malinen